No. 87-121

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

RICHARD L. DUGGER, et al.,

Petitioners,

vs.

AUBREY DENNIS ADAMS, JR.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR RESPONDENT

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THE QUESTIONS PRESENTED FOR REVIEW

1. Did the trial judge's false denigration of the jury's sentencing role, by emphatically and repeatedly stating that the capital sentencing decision was in no way the jury's responsibility and did not rest on its conscience or shoulders, violate Mr. Adams' Eighth Amendment right to a decision-maker whose responsibility for his capital sentence was not undermined?

2. Is Mr. Adams' Eighth Amendment claim procedurally barred, in view of (a) the absence of an independent and adequate state procedural ground barring it, (b) the existence of "cause" and "prejudice" based upon the supervening decision in Caldwell v. Mississippi, 472 U.S. 320 (1985), or (c) the interests of justice, inasmuch as the claim involves the perversion of the jury's

deliberations on the ultimate penalty issue?

3. Should this Court address petitioners' submission of abuse of the writ of habeas corpus, on which certiorari was not sought or granted; if so, can Mr. Adams be held to have abused the writ by not raising in an earlier petition a claim which would have been procedurally barred and whose constitutional basis did not yet exist?

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COUNTER-STATEMENT OF THE CASE

A. Trial Proceedings

Respondent Aubrey Dennis Adams, Jr., who was twenty years old, had no

criminal record, and had been working as a correctional officer, was put on trial in October 1978 for the first-degree murder of Trisa Gail Thornley. The prosecution sought imposition of the death penalty.

During jury selection, the procedure followed was to question prospective jurors in groups. Those prospective jurors from a particular group who were not challenged remained in the courtroom while each successive group of prospective jurors was questioned. Indeed, on at least one occasion when a new question arose, it was posed to prospective jurors whose group had been questioned earlier. (See J.A. 5-8.)

The trial judge had intended to explain once, in front of the entire venire, the two phases of the trial and the jury's role in each phase, but he forgot to do so. (See J.A. 15.) As a result, he

instructed the prospective jurors no less than nine separate times that the jury had no responsibility whatsoever for the sentencing decision, that the decision whether to impose the death penalty was not on the jurors' consciences and did not rest on their shoulders, and that the judge, on whose conscience he said the decision solely rested, was free to disregard the jury's sentencing recommendation. (See J.A. 19, 27-28, 34-35, 40-41, 47-48, 53-55, 61-63, 69-71, 77-79.) Moreover, the judge took it upon himself during Witherspoon questioning to stress that "They don't vote a death verdict" (J.A. 21), to say, "You heard the Court explain to you, did you not, that it is not you who will impose the death penalty?" (J.A. 71), and to ask whether jurors "could not vote for a recommendation to the Judge for a death penalty, even though the Judge is not

bound to follow it." (See Adams v. Wainwright, 804 F.2d 1526, 1533 n.8 (11th Cir. 1986) (quoting p. 369 of trial transcript).

Four members of the jury in Mr. Adams' case -- Mrs. Wright, Mr. Anderson, Mr. Hull and Mr. Long (see J.A. 5-6, 13-15) -- were present during all eleven of these instructions. Three more jurors -- Mr. Broomfield, Mrs. Hart and Mrs. Clark (see J.A. 6, 13-15) -- were present the last nine times. An eighth juror, Mr. Henson (see J.A. 8, 13-15), was present the last six times. A ninth juror, Mr. Rayburn (see J.A. 9, 13-15), was present the last five times. The other three jurors -- Miss Locke, Mr. Bronson and Mr. Brown (see J.A. 9-10, 13-15) -- were present the last four times. Indeed, the judge gave these (and other) explanations so many times in front of the same jurors

that at one point he asked those who had already heard the explanations to bear with him. (See J.A. 41.)

During these repeated explanations, the judge stressed that it was vital for the jurors to understand their lack of responsibility for the sentencing decision. For example, he stated (J.A. 34-35):

> "One thing is very, very important. That is only a recommendation to the Judge. It is not upon your conscience whether this man goes to the electric chair or not but it's solely upon the Judge's conscience. Even if you came back and recommended death, the Court has the right and the power to say, I disregard your recommendation and give the man life imprisonment. If you come back and say the man should not be put to death and I disagree with that, the Court has the power to say, I disregard your recommendation of life and put him to death. The ultimate responsibility of whether this man shall be put to death or not put to death is on the Court's shoulder and upon the Court's conscience and is not upon your conscience."

These instructions misstated the actual significance of the jury's recommendation under Florida law. Contrary to Pet. Br. 3, the judge could not disregard the jury's recommendation. Rather (as discussed in more detail on pages 27-35, infra), the judge was required to give the jury's recommendation great weight and was required to follow it unless "virtually no reasonable person" would agree with the recommendation. See, e.g., Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975); LeDuc v. State, 365 So. 2d 149, 151 (Fla. 1978), cert. denied, 444 U.S. 885 (1979). "Juries are the conscience of our communities," McCaskill v. State, 344 So. 2d 1276, 1280 (Fla. 1977); accord Holsworth v. State, 522 So. 2d 348, 354 (Fla. 1988); "a jury's advisory opinion is entitled to great weight, reflecting as it does the conscience of the community, and should

not be overruled unless no reasonable basis exists for the opinion," Richardson v. State, 437 So. 2d 1091, 1095 (Fla. 1983).

Yet, the judge at Mr. Adams' trial repeatedly emphasized to the jury that the sentencing decision was not on its conscience but solely on his:

> "So that this conscience part of it as to whether or not to put the man to death or not, that is not your decision to make. That's only my decision to make and it has to be on my conscience. It cannot be on yours. * * *" (J.A. 19-20, heard by 4 of the 12 jurors.)

* * *

> "The Court is not bound to accept your recommendation, so that I do not want you to feel that it is on your conscience to put the man to death. That is not your responsibility but that is the Court's responsibility and it is something that I have to put on my shoulders. * * * You are the sole judge as to whether or not he is guilty or innocent. I am the sole determiner on whether or not the man receives life or is put into the electric chair." (J.A. 27-28, heard by 7 of the 12 jurors.)

* * *

"[T]he most important thing on this is for you to understand that that is a recommendation to the Judge. It is not on your conscience and it's not on your shoulders and it's not your responsibility to decide whether or not this man will be put to death. That's on the Court's shoulders and it's the Court's responsibility." (J.A. 47, heard by 8 of the 12 jurors.)

* * *

"It should not be on your conscience nor is it on your shoulders whether or not this man will be put to death or not. That is the Court's sole responsibility and not the Jurors' in any manner whatsoever. * * * The Court is not trying to shuttle this obligation off to the jury at all, and I don't want you to feel that you determine whether or not this man lives or dies because you don't. * * *" (J.A. 54-55, heard by 9 of the 12 jurors.)

* * *

"Now the most important thing to remember in Phase Two is that the second vote that you take is exactly what it is, a recommendation to the Judge. The Judge is not bound to follow that recommendation. You will not de-

cide whether or not this man will be put to death or not put to death. That is the Judge's decision and I am the only one that will make that decision, * * * but you should not feel on your conscience or that it's on your shoulders whether or not this man is going to be put to death or not because that is not your decision. * * * So the responsibility and the conscience it has to bear upon as to whether or not this man is going to be put to death or not is not yours; it's mine. * * * [I]t should not be on your conscience nor is it your responsibility. That's the Court's responsibility." (J.A. 69-71, heard by all 12 jurors.)

* * *

"The most important thing, I think, for a Juror to remember is in reference to the recommendation. It is merely that, exactly what it says. It's a recommendation to the Judge. The Judge is not bound to follow that recommendation. You may come back and recommend that I order that the man be put to death. The Judge has the obligation and the duty to say, I disagree with the recommendation; I order the man to be sentenced to life imprisonment, or, you can come back and say, we recommend that the man should be put into prison for life and not

> be given death. The Judge has the obligation and the duty to say, I disregard that; I feel that the man should be put to death, and I can order him to be put to death. So the conscience that must bear whether or not the man should be put to death or not is not your conscience; it's the Court's conscience. It's on my shoulders and it's my responsibility to do that. It is not on your shoulders nor on your conscience. You cannot order this man put to death or not put to death. That's not your job. Your recommendation to the Judge is one of the tools that the Judge uses to try to make up his mind. It's not the only tool, by any stretch of the imagination. So that it is strictly a recommendation and nothing more." (J.A. 77-79, heard by all 12 jurors.)

During his guilt phase instructions, the judge again told the jury that if there were a sentencing phase, he could "reject" the jury's recommendation. (See J.A. 80-81.) At the outset of the sentencing phase, he reminded the jury that he had previously told them about the second phase of the trial, and he repeated that

"the final decision as to what punishment shall be imposed rests solely upon the Judge of this Court." (See J.A. 82.)

During closing argument, the prosecutor told the jurors that "the opinion of yours is advisory." (See J.A. 84.) Neither he nor defense counsel stressed the vital importance of the jury's recommendation. The judge's sentencing phase instructions referred back to his prior explanations of the jury's role, stating "As you have been told, the final decision as to what punishment should be imposed is the responsibility of the judge." (See J.A. 85.)

A majority of the jury recommended the death penalty. (J.A. 95.) The trial judge followed that recommendation, although he found an equal number of aggravating and mitigating circumstances, the latter being (1) that Mr. Adams had no

significant history of prior criminal activity; (2) that Mr. Adams was under the influence of extreme emotional disturbance at the time of the offense; and (3) that Mr. Adams was only 20 years old at the time of the offense. See Adams v. State, 412 So. 2d 850, 857 (Fla. 1982) (Boyd, J., dissenting), cert. denied, 459 U.S. 882 (1982).

B. Proceedings Following The Trial

Mr. Adams appealed his conviction and sentence to the Florida Supreme Court in 1979. The conviction was unanimously affirmed, but two justices dissented from the affirmance of the sentence, on the ground that it was excessive on the facts. See Adams v. State, 412 So. 2d at 857 (Fla. 1982) (Boyd, J., dissenting) (death sentence must be reduced to life in view of the dispositions of "prior similar crimes of violence"); Adams v. State, 456

So. 2d 888, 891 (Fla. 1984) (McDonald, J., dissenting) (explaining that Justice McDonald had also dissented on direct appeal because Mr. Adams' death penalty was improper and disproportionate). If one more justice had concluded that the death sentence should not be affirmed, it would have been reversed. Vasil v. State, 374 So. 2d 465, 471 (Fla. 1979), cert. denied, 446 U.S. 967 (1980).

On August 21, 1984, the Governor denied clemency and signed a death warrant scheduling Mr. Adams' execution for September 19, 1984. Since Mr. Adams had no lawyer, the chairperson of the Florida Bar's Special Committee on the Representation of Death-Sentenced Inmates in Collateral Proceedings contacted the law firm of Ausley, McMullen, McGehee, Carothers and Proctor on August 23, 1984, asking it to represent Mr. Adams. Although the firm

had no experience in capital cases, it agreed on August 27, 1984 to represent Mr. Adams, after determining that no other counsel was available. No assistance was available from attorneys with substantial experience in post-conviction representation of death row inmates. On September 5, 1984, the Ausley firm filed an application for a stay and a motion to vacate judgment and sentence pursuant to Fla. R. Crim. P. 3.850. After losing in the trial court on September 7, 1984 and in the Florida Supreme Court on September 11, 1984, Mr. Adams' inexperienced volunteer counsel filed a federal habeas corpus petition on September 14, 1984. After argument on September 17, it was dismissed on September 18, 1984. (See Petitioner's Appendix U in the Court of Appeals.) The Eleventh Circuit, after entering a stay of execution, affirmed. Adams v. Wainwright,

764 F.2d 1356 (11th Cir. 1985), cert. denied, 106 S. Ct. 834 (1986).

On March 2, 1986, shortly after certiorari was denied, Mr. Adams filed a second Rule 3.850 motion, raising for the first time an Eighth Amendment claim based on this Court's decision in Caldwell v. Mississippi, 472 U.S. 320, which had been handed down on June 11, 1985. This was denied by the trial court, and Mr. Adams unsuccessfully appealed to the Florida Supreme Court, which held that the Caldwell claim (together with other claims not previously raised) was barred because it had not been raised at the time of the direct appeal in 1979. Adams v. State, 484 So. 2d 1216 (Fla. 1986.)[1]

On March 5, 1986, Mr. Adams filed the present habeas corpus proceeding

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[1] See pages 56-58, infra, for discussion of Petitioners' erroneous assertion about this decision.

in federal district court. The district judge held that the raising of the Caldwell claim was both an abuse of the writ and procedurally barred, for this reason: that Mr. Adams' "claim does not derive any merit from the Caldwell decision [which] * * * does not apply in the instant case * * *." (See Cert. Pet. App. at 57.)

C. The Decision Below

On appeal, the Eleventh Circuit found that the Caldwell claim was not procedurally barred, both because there was no adequate and independent state ground barring it and because Mr. Adams had shown "cause" and "prejudice." The Court of Appeals discerned no abuse of the writ. Adams v. Wainwright, 816 F.2d 1493 (11th Cir. 1987).

On the merits, it held that "the trial judge's seriously misleading statements" about the jury's responsibility

violated the Eighth Amendment, by creating "an impermissible danger" that the jury abdicated its heavy responsibility for determining in the first instance whether death was the appropriate punishment. Adams v. Wainwright, 804 F.2d 1526, 1533 (11th Cir. 1986). The Court concluded that:

> "Because in Adams' case the jury's recommended sentence of either life or death would fall within the wide area of deference established by the Tedder standard, Adams might be executed although no sentencer had ever made a considered determination that death was the appropriate sentence if his sentence were allowed to stand. * * *"

Id. (citing Caldwell).

SUMMARY OF ARGUMENT

Mr. Adams' Eighth Amendment rights were clearly violated by the trial judge's numerous emphatic misstatements that the jury had no responsibility for the imposition of the death penalty, that

the capital sentencing decision in no way rested on the jurors' consciences or shoulders, and that he could disregard their sentencing recommendation. A Florida jury's capital sentencing recommendation is not something which the trial judge may in fact disregard. It is supposed to be given great weight, because the jury is "the conscience of the community," and it can be overruled only if virtually no reasonable person would agree with it. Holsworth v. State, 522 So. 2d 348 (Fla. 1988).

The judge's mischaracterizations of the jury's sentencing role undermined the jurors' responsibility for the life-or-death decision in Mr. Adams' case. This violated the Eighth Amendment principle, announced in Caldwell v. Mississippi, 472 U.S. 320 (1985), that the decision-makers in a capital sentencing process

must not be misled about the nature of their responsibility. As Caldwell recognized, the Eighth Amendment's requirement of reliability in capital sentencing cannot be assured where a decisionmaker is misinformed about the significance of its decision.

Mr. Adams was prejudiced by the judge's repeated deprecations of the jury's responsibility for capital sentencing, which were manifestly designed to reassure people with qualms about taking responsibility for a death sentence that they could vote for death in Mr. Adams' case without troubling their consciences, in light of the jury's supposedly unimportant role. This made it more likely that the jurors would vote for the death penalty in Mr. Adams' case, although a jury which properly understood its responsibility could readily have recommended a life

sentence on the basis of several mitigating circumstances. The appeal process was also distorted, because the Florida Supreme Court's majority reviewed the death sentence on the premise that it had been imposed pursuant to the recommendation of a jury which exercised its full responsibility.

There is no basis for applying a procedural bar to Mr. Adams' Eighth Amendment claim here. There was no independent state procedural ground for the Florida Supreme Court's refusal to decide the merits of that claim, since that court does consider claims which are predicated on changes in constitutional law after the direct appeal or which otherwise involve fundamental error. Moreover, Mr. Adams has, in any event, satisfied the cause and prejudice test.

There was "cause" for Mr. Adams' not raising his Eighth Amendment claim on direct appeal in 1979, since the legal basis for the claim was not then "'reasonably available to counsel.'" Amadeo v. Zant, 56 U.S.L.W. 4460, 4463 (U.S., May 31, 1988) (quoting Murray v. Carrier, 477 U.S. 478, 488 (1986)). Prior to Caldwell, no court had held that misleading a decisionmaker about its responsibility for a capital sentencing decision violated the Eighth Amendment. Indeed, Dobbert v. Florida, 432 U.S. 282, 294 n.7 (1977), indicated that it was appropriate for jurors to have a diminished view of their role in capital sentencing. The existing state law precedents did not provide the tools for Mr. Adams' Eighth Amendment claim, because state law errors are simply not the same as federal constitutional claims. See, e.g., Barclay v. Florida,

463 U.S. 939, 957-58 (1983) (plurality opinion by Rehnquist, J.).

Mr. Adams has also shown "prejudice." There was "an impermissible danger that the jury's recommended sentence was unreliable and, consequently, that Adams' death sentence was unreliable." Adams v. Wainwright, 816 F.2d 1493, 1501 (11th Cir. 1987).

Moreover, the interests of justice require consideration of Mr. Adams' claim. The judge's misstatements "serve[d] to pervert the jury's deliberations concerning the ultimate question," and thus created a "fundamental miscarriage of justice." See Smith v. Murray, 477 U.S. 527, 538 (1986).

There is no basis here for barring Mr. Adams' claim as an abuse of the writ. Certiorari was not granted on any question concerning abuse of the writ, so

that issue should not be considered. See Arizona v. Hicks, 107 S. Ct. 1149, 1155 (1987). In any event, Mr. Adams cannot have abused the writ, since at the time of his first federal habeas corpus petition, he could not have gotten a ruling on the merits of his Eighth Amendment claim. Prior to Caldwell, he could not have surmounted the procedural bar applied by the Florida courts.

Furthermore, under the pertinent test for abuse of the writ, that utilized in Smith v. Yeager, 393 U.S. 122, 126 (1968), Mr. Adams did not abuse the writ, since his Eighth Amendment claim was of no more than "doubtful existence" prior to Caldwell. Until Caldwell, no court anywhere had recognized such a claim, and this Court's decision in California v. Ramos, 463 U.S. 992, 1011, 1012 n. 27 (1983), seemed to point in the opposite

direction. It appeared to indicate that an instruction which caused a jury to approach a capital sentencing decision with diminished responsibility and thus was detrimental to the defendant would not be unconstitutional.

Finally, the ends of justice require consideration of Mr. Adams' claim. Mr. Adams should not be put to death under a sentence based on the recommendation of a jury which was supposed to serve as the conscience of the community but was emphatically and repeatedly told that it had no responsibility for the sentence so that a death sentence did not rest on its conscience.

ARGUMENT

I.

THE TRIAL JUDGE'S REPEATED, STRENUOUS, FALSE DENIGRATIONS OF THE JURY'S SENTENCING ROLE VIOLATED MR. ADAMS' EIGHTH AMENDMENT RIGHT TO A DECISIONMAKER WHOSE RESPONSIBILITY FOR HIS CAPITAL SENTENCE WAS NOT UNDERMINED

A. All Members Of The Eleventh Circuit Have Recognized That This Case Involves An Especially Egregious Violation Of The Eighth Amendment

The Eleventh Circuit has divided on the application of Caldwell in Florida cases less extreme than Mr. Adams'. But every member of the court apparently agrees that the Eighth Amendment violation in Mr. Adams' case was unmistakably egregious. Judge Fay's opinion denying relief in Harich v. Dugger, 844 F.2d 1464 (11th Cir. 1988) (en banc), joined on the merits by all of the judges who dissented from the grant of relief in Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988) (en banc), em-

phasizes that Mr. Adams' death sentence is unconstitutional because:

> "[t]he trial court in Adams incorrectly led the jury to believe that the responsibility for imposing the death sentence rested solely upon himself. The trial judge instructed the jury that he could disregard the jury's recommendation, even if the jury recommended life imprisonment. This was incorrect. * * * Furthermore, the trial court told the jury that: '[T]his conscience part of it as to whether or not you're going to put the man to death or not, that is not your decision to make. That's only my decision to make and it has to be on my conscience. It cannot be on yours.' Adams, 804 F.2d at 1528. Caldwell prohibits such attempts to shield the jury from the full weight of its advisory responsibility."

Harich, 844 F.2d at 1473.[2]

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[2] Judge Tjoflat's special concurrence, which was joined by the other judges who voted to grant relief in Mann but not in Harich, takes the view that Judge Fay's opinion focuses too much on whether the prosecutor's and judge's statements in Harich "were accurate in a very technical sense" and does "not fully consider whether the jurors were nevertheless left with a misimpression as to the importance of

(Footnote continued)

B. The Jury Has A Vital Role In Capital Sentencing In Florida

To understand why all the judges of the Eleventh Circuit see Mr. Adams' case as representing a clear Caldwell violation, it is important to consider the jury's vital role in Florida's capital sentencing system.[3] Judge Tjoflat's opinion in Mann perceptively analyzes the various contexts in which the Florida Supreme Court has recognized how significant the

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(Footnote 2 continued from previous page)
their role." Id. at 1475 (Tjoflat, J., specially concurring). This Court need not in this case decide which of the differing approaches set forth in the various opinions in Mann and Harich it prefers, since the opinion which reads Caldwell most narrowly, Judge Fay's opinion in Harich, emphatically states that Mr. Adams' death sentence violates the Eighth Amendment. See 844 F.2d at 1473.

[3] This Court has previously recognized that the deference accorded to a Florida jury's recommendation of a life sentence provides a "significant safeguard" to a capital defendant. See Spaziano v. Florida, 468 U.S. 447, 465 (1984).

jury's recommendation is in a Florida capital sentencing proceeding. 844 F.2d at 1450-53.[4]

Thus, the Florida Supreme Court "has long held that a Florida capital sentencing jury's recommendation is an integral part of the death sentencing process," and has considered the jury's role to be "fundamental." Riley v. Wainwright, 517 So. 2d 656, 657, 658 (Fla. 1987). Accordingly, the jury's recommendation:

> "is entitled to great weight, reflecting as it does the conscience of the community, and should not be overruled unless 'the facts suggesting a sentence of death [are] so clear and convincing that virtually no rea-

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[4] As discussed at pages 54-55, infra, the Eleventh Circuit's reading of Florida law is entitled to deference here. Judge Tjoflat (who wrote the Mann decision), Chief Judge Roney and Judge Fay (who were on the panel which unanimously voted in favor of Mr. Adams' Caldwell claim), and other Eleventh Circuit judges are especially familiar with Florida law and have dealt with dozens of Florida death penalty cases.

> sonable person could differ.' Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975). * * *"

Holsworth v. State, 522 So. 2d 348, 354 (Fla. 1988); accord Richardson v. State, 437 So. 2d 1091, 1095 (Fla. 1983); Odom v. State, 403 So. 2d 936, 942 (Fla. 1981), cert. denied, 456 U.S. 925 (1982); McCaskill v. State, 344 So. 2d 1276, 1280 (Fla. 1977). In contrast, the judge's role is to serve as "a buffer where the jury allows emotion to override the duty of a deliberate determination" of the appropriate sentence. Cooper v. State, 336 So. 2d 1133, 1140 (Fla. 1976), cert. denied, 431 U.S. 925 (1977).

As discussed in Mann, 844 F.2d at 1450-52, the jury's recommendation is to be given great weight both when the recommendation is life and when the recommendation is death. See, e.g., Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975)

(jury recommendation of life "should be given great weight" and not overruled unless "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ"); LeDuc v. State, 365 So. 2d 149, 151 (Fla. 1978), cert. denied, 444 U.S. 885 (1979) ("the recommended sentence of a jury [which in that case was death] should not be disturbed if all relevant data was considered, unless there appear strong reasons to believe that reasonable persons could not agree with the recommendation"); Smith v. State, 515 So. 2d 182, 185 (Fla. 1987), cert. denied, 108 S. Ct. 1249 (1988) ("a jury recommendation of death is entitled to great weight").[5]

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[5] In a case cited by petitioners (Pet. Br. 56), Wainwright v. Goode, 464 U.S. 78, 86 (11th Cir. 1983) (per curiam), this Court upheld the Florida Supreme Court's affirmance of a death penalty despite the trial judge's consideration of an improper aggravating circum-

(Footnote continued)

As the Mann decision goes on to explain, the Florida Supreme Court's "understanding of the jury's sentencing role is illustrated by the way it treats sentencing error," i.e., by vacating a jury's death sentence recommendation which has been followed by a judge if "the proceedings before the original jury were tainted by error." See id., 844 F.2d at 1452-53. For example, the Florida Supreme Court has ordered a new sentencing proceeding before a new jury where relevant mitigating evidence was excluded at the original sentencing proceeding, Valle v. State, 502 So. 2d 1225, 1226 (Fla. 1987); Simmons v. State, 419 So. 2d 316, 320 (Fla. 1982), and where the trial judge instructed the jury not to consider nonstatutory mitigat-

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(Footnote 5 continued from previous page)
stance, in part because "[a] properly instructed jury recommended a death sentence."

ing circumstances, Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987); Combs v. State, 13 Fla. Law W. 142 (Fla. Feb. 18, 1988). Indeed, where the jury recommended death and the judge imposed the death penalty, the Florida Supreme Court has ordered a new sentencing proceeding despite the trial judge's consideration of mitigating evidence that the jury was erroneously prevented from hearing. Messer v. State, 330 So. 2d 137 (Fla. 1976).

The Florida Supreme Court often focuses in such cases "on how the error may have affected the jury's recommendation" -- a focus which, as the Eleventh Circuit has pointed out, "would be illogical unless the supreme court began with the premise that the jury's recommendation must be given significant weight by the trial judge." Given that premise, "if the jury's recommendation is tainted, then the

trial court's sentencing decision, which took into account that recommendation, is also tainted." Mann, 844 F.2d at 1453.[6]

The Eleventh Circuit has also recognized the significance of such Florida cases as Riley. The Florida Supreme Court reversed the imposition of the death penalty in Riley, even though the trial judge did consider mitigating evidence, because that was "insufficient to cure" the erroneous ruling which precluded the jury from considering that evidence. That made the jury's recommendation of death, which the trial judge had upheld, "infirm." 517 So. 2d at 659 n.1.

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[6] As the Eleventh Circuit also pointed out, the Florida Supreme Court's practice of ordering resentencing in cases of improper Witherspoon exclusions, e.g., Chandler v. State, 442 So. 2d 171, 173-75 (Fla. 1983), constitutes an implicit acknowledgement of the jury's "substantive role under the Florida capital sentencing scheme."

As the Eleventh Circuit has said, cases such as Riley demonstrate the Florida Court's understanding "that a jury recommendation of death has a sui generis impact on the trial judge, an impact so powerful as to nullify the general presumption that a trial judge is capable of putting aside error." See Mann, 844 F.2d at 1454. Indeed, as the Eleventh Circuit observed, it would "be surprising were the trial judge, who in Florida is also an electorally accountable official, not powerfully affected by the result" of a process in which "the jury, traditionally depicted as the conscience of the community," has made "a judgment about the appropriateness of death in light of aggravating and mitigating circumstances." Id.

Hence, the State's assertions here that "jury misadvice can never evolve into an actual sentence" (Pet. Br. 12) and

that "[t]here is virtually no statement which could diminish the jury's sense of responsibility for sentencing, because the jury is not the sentencer in the first instance" (Pet. Br. 51), are just as erroneous as its contention in Ferry v. State, 507 So. 2d 1373 (Fla. 1987), that the trial judge's override of the jury's recommendation of life was proper because the judge was the ultimate sentencer and had weighed the circumstances reasonably. In rejecting that argument and reversing the override (as it has done in numerous other cases), the Florida Supreme Court stated:

> "Under the state's theory there would be little or no need for a jury's advisory recommendation * * *. This is not the law. Sub judice, the jury's recommendation of life was reasonably based on valid mitigating factors. The fact that reasonable people could differ * * * renders the override improper."

Id. at 1376-77 (emphasis in original).

C. The Repeated Misstatements Made To Mr. Adams' Jury Deprecating Its Sentencing Role Undermined Its Responsibility, In Violation Of The Eighth Amendment

1. The Jury Was Misled Into Feeling It Had No Responsibility For The Sentencing Decision

As shown at pages 3-11, supra, the judge at Mr. Adams' trial repeatedly stressed to the jury that he could disregard its recommendation and that the capital sentencing determination was not "in any manner whatsoever" on the jurors' consciences or shoulders, but rather rested solely on the judge's conscience and shoulders and was solely his responsibility. But the numerous Florida Supreme Court decisions just discussed and the additional ones cited in Mann (844 F.2d at 1450-54) make clear that in fact the jury's recommendation had to be given great weight by the judge because a Florida jury is supposed to serve as the conscience of

the community in capital sentencing. Moreover, the Florida Supreme Court has much less leeway to overturn a death sentence which follows a jury's recommendation.

2. The Judge's Instructions Made A Jury Recommendation Of The Death Sentence More Likely

Mr. Adams was clearly prejudiced by the judge's misstatements of the jury's sentencing role, since they functioned to undermine the jury's responsibility for the life-or-death decision. This was their very purpose. Thus, the judge interrupted Witherspoon questioning to stress that the jurors "don't vote a death verdict. They only vote the question of guilt or innocence. * * * The obligation is mine." (J.A. 21.) This was manifestly intended to reassure anyone with qualms about accepting responsibility for a death sentence, so that s/he could sit as a ju-

ror and vote for death in Mr. Adams' case with an untroubled soul, in view of the jury's supposedly unimportant role. Indeed, in later Witherspoon questioning, the judge, in the presence of all twelve trial jurors, asked two prospective alternate jurors who had indicated doubt about voting for the death penalty whether they "could not vote for a recommendation to the Judge for a death penalty, even though the Judge is not bound to follow it." See Adams, 804 F.2d at 1533 n.8 (quoting p.369 of trial transcript (emphasis added)).

The judge's frequent reiteration that the sentencing decision was not on the jurors' consciences also made it more likely that they would vote for the death penalty. It clearly is easier to vote for the death sentence if that will not weigh on one's conscience. Jurors who heard the judge say "I do not want you to feel that

it is on your conscience to put the man to death" (J.A. 27) were more likely to vote for death in order to "'send a message' of extreme disapproval for" Mr. Adams' acts even if they were "unconvinced that death [was] the appropriate punishment * * *." See Caldwell v. Mississippi, 472 U.S. 320, 331 (1985) (quoting Maggio v. Williams, 464 U.S. 46, 54-55 (1983) (Stevens, J., concurring)).

Under these circumstances, the death sentence was unconstitutional, since, as in Caldwell, the judge's statements:

> "misle[d] the jury as to its role in the sentencing process in a way that allow[ed] the jury to feel less responsible than it should for the sentencing decision."

See Darden v. Wainwright, 106 S. Ct. 2464, 2473 n.15 (1986).

3. Caldwell Is Applicable Where, As Here, The Decisionmaker's Responsibility For A Capital Sentence Is Undermined

Caldwell is not, as Petitioners maintain, distinguishable on the ground of state-law differences in the respective sentencing roles of Mississippi and Florida juries. Whether or not those differences would support an accurate description to a Florida capital jury of its actual responsibilities, they cannot sustain the glaringly inaccurate depiction of its role conveyed to Mr. Adams' jurors. The constitutional vice found in Caldwell was not premised on the manner in which Mississippi law divided capital sentencing responsibility between jurors and judges -- a matter which the Eighth Amendment leaves to State option. Spaziano v. Florida, 468 U.S. 447 (1984). The federal constitution neither erects a particular

capital sentencing procedure, see, e.g., Franklin v. Lynaugh, 56 U.S.L.W. 4698 (U.S., June 22, 1988), nor requires that the particular procedure erected in a given State be meticulously followed, see, e.g., Barclay v. Florida, 463 U.S. 939 (1983).

The crucial Eighth Amendment principle that was established in Caldwell, and was violated here, is that the decisionmakers in a capital sentencing process must know with accuracy and not be misled about the nature of their responsibility. As Justice O'Connor stated in Caldwell, the constitutional problem there was that "the prosecutor's remarks * * * were inaccurate and misleading in a manner that diminished the jury's sense of responsibility." 472 U.S. at 342 (O'Connor, J., concurring). Caldwell recognized that one of the Eighth Amendment's fundamental

requirements, reliability in capital sentencing, see, e.g., Gardner v. Florida, 430 U.S. 349 (1977), cannot be assured where the decisionmaker is misinformed about the significance of its judgment.[7]

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[7] This Court has stressed the reliability requirement in several cases, although none until Caldwell indicated that a crucial aspect of reliability is that the decisionmaker not be misled about its responsibility for the sentencing decision. See, Beck v. Alabama, 447 U.S. 625, 637-38 (1980) (forced choice between a verdict of guilt on a capital offense and a verdict of not guilty creates a false dichotomy which risks an unwarranted conviction, thereby violating the Eighth Amendment's heightened requirement of reliability in capital cases); Woodson v. North Carolina, 428 U.S. 280, 303-05 (1976) (opinion of Stewart, Powell and Stevens, JJ.) (failure to allow particularized consideration of mitigating factors violates Eighth Amendment's "need for reliability"); Johnson v. Mississippi, 56 U.S.L.W. 4561, 4563, 4564 (U.S., June 13, 1988) (Eighth Amendment requirement of reliability was violated when jury was allowed to consider "evidence, that has been revealed to be materially inaccurate") (footnote omitted). California v. Ramos, 463 U.S. 992 (1983), is not inconsistent with these authorities: the majority there found that the "Briggs" instruction

(Footnote continued)

This requirement was surely violated here. Although two Florida Supreme Court justices found Mr. Adams' case similar to cases in which life sentences were generally imposed (see pages 12-13, supra), a majority of that court affirmed his death sentence on the premise that it had been imposed pursuant to the jury's recommendation. Yet, the jurors had been told that Mr. Adams' death would not be on their shoulders, leaving Mr. Adams in the exact predicament described by a noted legal scholar:

> "[W]hile the jury may be counting on the fail-safe mechanism of a final review, especially if its availability was announced by the court or counsel, the reviewer in turn will pay heed to the jury's determination that the defendant deserves to die. Here is Alphonse and Gaston

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(Footnote 7 continued from previous page)
promoted the jury's accurate understanding of its choices. See Caldwell, 472 U.S. at 342 (O'Connor, J., concurring).

> without comedy. In capital sentencing, divided responsibility is avoidance of responsibility."

Gillers, The Quality of Mercy: Constitutional Accuracy at the Selection Stage of Capital Sentencing, 18 U.C. Davis L. Rev. 1037, 1108 (1985).[8]

4. The Violation Of The Eighth Amendment Here Was Even More Egregious Than That In Caldwell

What occurred in Mr. Adams' case was worse than what occurred in Caldwell. The misleading statements here were made not by the prosecutor, but by the trial judge. They were emphatic and repeated. They did far more than leave the jury with a potential failure "to appreciate without

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[8] Although the Florida Supreme Court tried to perform the meaningful appellate review described in Spaziano (and referred to in Pet. Br. 55-56), that review was skewed by the distorting effect of the jury's recommendation, which, as this Court said in Spaziano, is supposed to be a "significant safeguard" for the defendant. 468 U.S. at 465.

explanation the limited nature of appellate review * * *." 472 U.S. at 343 (O'Connor, J., concurring). Here, the judge made the out-and-out misstatements that he could disregard the jury's recommendation, that the jury bore no responsibility for a sentence, and that the imposition of a death sentence would in no way rest on the jurors' consciences or shoulders. Neither the judge nor anyone else told Mr. Adams' jurors that "the Jury -- the people -- the people, not the Court -- the people, the heart of the system, must determine -- must determine" the relative weight of the aggravating and mitigating circumstances because "you're in the Jury box to determine the punishment * * *."

See Caldwell, 472 U.S. at 346 (Rehnquist, J., dissenting) (emphasis in original).[9]

D. Petitioners' Attempts To Distort The Eleventh Circuit's Holding Must Fail

Petitioners' response to the Eleventh Circuit's cogent recognition of the Caldwell violation in Mr. Adams' case is to turn that holding on its head. Incredibly, the State asserts that the Elev-

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[9] The language in the judge's charge here (referred to in Pet. Br. 47) does not similarly emphasize the jury's role and was in any event overwhelmed by the judge's repeated, emphatic efforts to denigrate the jury's role. Moreover, nothing in either attorney's closing argument emphasized the importance of the jury's sentencing role. Petitioners err in asserting that because the most egregiously improper statements by the judge occurred in voir dire, the Eighth Amendment cannot apply (Pet. Br. 53). These were not, as Petitioners maintain, "extraneous comments in recognition" of the jury's advisory function, but rather were repeatedly stressed statements, referred to again during the closing jury instructions, which misinformed the jury about its function.

enth Circuit "requires that the jury be misled, or at the least, shielded from reality * * *" (Pet. Br. 54.) Actually, what the Eleventh Circuit did was to rectify a proceeding in which Mr. Adams' jury was both misled and shielded from reality, by being repeatedly instructed that they would not be responsible in any way for a death sentence and would not have it on their consciences.[10]

As Florida Supreme Court Justice Barkett correctly recognized even before the Eleventh Circuit's en banc opinions in

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[10] The Eleventh Circuit's holding here is more limited than the Florida Supreme Court's observation in Garcia v. State, 492 So. 2d 360, 367 (Fla.), cert. denied, 107 S. Ct. 680 (1986): "It is appropriate to stress to the jury the seriousness which it should attach to its recommendation and, when the recommendation is received, to give it weight. To do otherwise would be contrary to Caldwell v. Mississippi, 472 U.S. 320, 105 S. Ct. 2633, 86 L.Ed. 2d 231 (1985), and Tedder v. State, 322 So. 2d 908 (Fla. 1975)."

Mann and Harich, petitioners are also incorrect in asserting (Pet. Br. 48) that the decision below either directly or implicitly holds unconstitutional the use of Florida's pattern sentencing instructions. See Combs, supra (Barkett, J., concurring). In Mann, the Court of Appeals held that the judge's charge failed to "correct the false impression left by" the prosecutor's earlier statements, not that the pattern instructions in and of themselves were unconstitutional. See 844 F.2d at 1458. Judge Tjoflat's special concurrence in Harich makes this clear, pointing out that the very same charge given in Mann did not lead to Caldwell error in Harich, because in Harich "the statement was made * * * under entirely different circumstances," i.e., not in the wake of prosecutorial argument which "specifically and repeatedly downplayed the significance of

the jury's role * * *." See Harich, 844 F.2d at 1479 (Tjoflat, J., specially concurring).

In Mr. Adams' case, the constitutional problem is that long before he used the pattern instruction, the trial judge "incorrectly led the jury to believe that the responsibility for imposing the death sentence rested solely upon himself." See Harich, 844 F.2d at 1473. The sentencing phase charge failed to eliminate the unconstitutionality of such repeated misinformation because it did not correct any of the judge's emphatically erroneous statements. Instead, it referred back to them. (See page 11, supra.)

II.

THE PROCEDURAL DEFAULT DOCTRINE DOES NOT BAR CONSIDERATION OF MR. ADAMS' EIGHTH AMENDMENT CLAIM

A. There Was No Independent And Adequate State Procedural Bar To This Claim

The most fundamental of the several reasons why the procedural default doctrine does not bar consideration of Mr. Adams' Eighth Amendment claim is that there was no independent and adequate state procedural bar to its consideration. All but one member of the en banc Eleventh Circuit held in Harich that the panel in Mr. Adams' case had correctly decided that no procedural bar precluded consideration of a Caldwell claim in Florida, both because there was no independent and adequate state procedural ground and because "cause" and "prejudice" existed for the default in any event. See Harich, 844 F.2d at 1472 n. 10, upholding the panel ruling in Harich, 813 F.2d 1082, 1098 n.17 (11th Cir. 1987), which had relied on the

disposition of procedural bar issues in Mr. Adams' case.[11]

This Court recently re-emphasized that "'[A] state procedural ground is not "adequate" unless the procedural rule is "strictly or regularly followed." Barr v. City of Columbia, 378 U.S. 146, 149 (1964).'" Johnson v. Mississippi, 56 U.S.L.W. 4561, 4563 (U.S., June 13, 1988) (quoting Hathorn v. Lovorn, 457 U.S. 255, 262-63 (1982)). The Florida Supreme Court's application of a procedural bar in Mr. Adams' case was not "adequate" under the foregoing test.

As the Eleventh Circuit's discussion shows, the Florida courts consider claims raised for the first time in post-

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[11] Judge Hill, the only judge not to agree that the merits should be decided in Harich, did not address the existence of an independent and adequate bar. See 844 F.2d at 1479-80.

conviction proceedings under Rule 3.850 where the claims (a) are premised on changes in constitutional law that have occurred since the direct appeal or (b) otherwise involve fundamental error. See Adams v. Wainwright, 816 F.2d 1493, 1497 (11th Cir. 1987), citing numerous cases[12] and concluding that "Adams' Caldwell claim is the very type of claim for which Flori-

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[12] E.g., Tafero v. State, 459 So. 2d 1034, 1035 (Fla. 1984) (claim premised on Enmund v. Florida, 458 U.S. 782 (1982), a change in law, is cognizable in post-conviction proceedings); Palmes v. Wainwright, 460 So. 2d 362, 365 (Fla. 1984) (suppression of evidence is fundamental error, cognizable in collateral proceedings). More recently, the Florida Supreme Court has addressed in collateral proceedings claims based on Hitchcock v. Dugger, 107 S. Ct. 1821 (1987). E.g., Combs, supra. Indeed, Combs is one of at least three cases in which the Florida Supreme Court has considered Caldwell claims in collateral proceedings (contrary to the assertion in Pet. Br. 28-29 n.7). Others are Mann, see 844 F.2d at 1448 n.4 (construing Mann v. State, 482 So. 2d 1360, 1362 (Fla. 1986)); and Darden v. State, 475 So. 2d 217, 221 (Fla. 1985).

da created the Rule 3.850 procedure."[13] Hence, the Eleventh Circuit correctly concluded that the Florida Supreme Court's application of the procedural bar here was either based on its incorrect determination that Caldwell has no inapplicability to Mr. Adams' claim[14] or else "represents

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[13] The State cites two inapposite cases as support for its erroneous assertion (Pet. Br. 29 n.7) that "federal constitutional errors are not 'fundamental' errors to which Florida's waiver rule" would apply. The first case, Clark v. State, 363 So. 2d 331 (1978), merely held that the particular constitutional violation there -- a comment on the right to remain silent -- was not fundamental, since it could be harmless error and did not go to the heart of the proceeding. Clark did not say that federal constitutional law changes generically are not fundamental for waiver purposes. The second case, Sanford v. Rubin, 237 So. 2d 134 (Fla. 1970), was a civil case and thus did not involve a collateral proceeding following a criminal trial and appeal.

[14] The Eleventh Circuit correctly noted that this situation is governed by the holding in Ake v. Oklahoma, 470 U.S. 68, 74-75 (1985), that "when resolution of the state procedural law question depends on a federal constitutional ruling, the state-law prong of the

(Footnote continued)

application of a procedural bar with regard to a type of claim that Florida does not regularly and consistently bar." Id.[15]

The Eleventh Circuit's analysis of the Florida caselaw of procedural default is entitled to deference in this

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(Footnote 14 continued from previous page)
court's holding * * * does not present an independent state ground for the decision rendered." Id. at 75. Ironically, it seems possible that the Florida Supreme Court is prepared to reach the merits of claims such as Mr. Adams', even on successive Rule 3.850 motions, if this Court rules in favor of Mr. Adams on the merits. It recently stated that "[t]he Eleventh Circuit's holdings in Mann and Adams cannot constitute a change of law because only this Court or the United States Supreme Court can effect a sufficient change of law to merit a subsequent post-conviction challenge to a final conviction and sentence." Card v. Dugger, 512 So. 2d 829, 831 (Fla.) (citation omitted), cert. denied, 107 S. Ct. 2203 (1987).

[15] Further inconsistencies in the Florida Supreme Court's application of its procedural bar rules are discussed in the amicus curiae brief submitted by the National Legal Aid and Defenders Association and two other organizations.

Court. As the Court recently said, "[w]e normally defer to Courts of Appeals in their interpretation of state law * * *." Maynard v. Cartwright, 56 U.S.L.W. 4501, 4502 (U.S., June 6, 1988). Such deference is warranted because:

> "The federal judges who regularly deal with questions of state law in their respective districts and circuits are in a better position than we to determine how local courts would dispose of comparable issues."

Butner v. United States, 440 U.S. 48, 58 (1979) (footnote omitted); accord Brown v. Allen, 344 U.S. 443, 458 (1953). It is particularly appropriate to defer to the Eleventh Circuit panel here, since two of its members, Chief Judge Roney and Judge Fay, have special familiarity with Florida jurisprudence.

B. Mr. Adams Has, In Any Event, Satisfied The Cause And Prejudice Test

The Eleventh Circuit went on to

hold that Mr. Adams has, in any event, shown both cause and prejudice with respect to his failure to raise his Eighth Amendment claim at the time sentence was imposed and his direct appeal was filed in 1979.

1. The Procedural Bar Applied Here Concerned Only The Failure To Raise The Caldwell Claim On Direct Appeal

Much as the prosecution unsuccessfully attempted to do in Johnson v. Mississippi, 56 U.S.L.W. 4561, 4564 n.7 (U.S., June 13, 1988), petitioners attempt here to translate the Florida Supreme Court's actual procedural default ruling into a different one, apparently because they recognize that the actual ruling will not stand up. They assert (Pet. Br. 33 n.8) that the Florida Supreme Court applied two procedural bars to Mr. Adams' Caldwell claim, one for his failure to

present it on direct appeal in 1979 and the second for his failure to raise it in his first Rule 3.850 proceeding in 1984.

However, the Eleventh Circuit was clearly correct in recognizing that the sole procedural bar which the Florida Supreme Court applied to Mr. Adams' Caldwell claim concerned the failure to present that claim when the direct appeal was filed in 1979, and that it applied a second bar only to claims which -- unlike the Caldwell claim -- had been raised previously and were being raised again in the second Rule 3.850 proceeding. See Adams, 816 F.2d at 1497 n.3. After invoking the abuse-of-procedure rule of McCrae v. State, 437 So. 2d 1388, 1390 (Fla. 1983), to bar two claims which had been decided against Mr. Adams in his prior Rule 3.850 proceeding, the Florida Supreme Court went on to say that the remaining claims, in-

cluding the newly raised Caldwell claim, were barred because "each one either was or should have been raised on direct appeal," a point also made earlier in the opinion.

The abuse-of-procedure ruling could not possibly have applied to the Caldwell claim. The very case, McCrae, which the Florida Supreme Court cited in support of that ruling held (on the very page it cited) that Rule 3.850 permits a second motion stating substantially different legal grounds than the first, and that a successor motion "should not be summarily dismissed solely on the basis that the prisoner has previously filed another Rule 3.850 motion." See 437 So. 2d at 1390.[16]

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[16] Pet. Br. 33 n.8 misleadingly refers to the present language of Rule 3.850, which does bar the raising of a new claim in a successor 3.850 motion. That language was not added until 1985, after Mr. Adams' first Rule 3.850

(Footnote continued)

2. The Eleventh Circuit Correctly Determined That There Was "Cause" For Not Raising This Eighth Amendment Claim On Direct Appeal

In holding that Mr. Adams had established "cause" for not raising his Eighth Amendment claim on direct appeal in 1979, the Eleventh Circuit applied the

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(Footnote 16 continued from previous page) motion had been dismissed. See Mello, Facing Death Alone: The Post-Conviction Attorney Crisis On Death Row, 37 Am. U.L. Rev. 513, 535 (1988). Florida has not retroactively applied the revised part of the rule to cases such as Mr. Adams'. Indeed, it has applied the revised part of the rule to Caldwell claims only where the revision was already in effect and Caldwell had already been decided at the time when the claim was not asserted in the first Rule 3.850 motion. See Delap v. State, 513 So. 2d 1050, 1050-51 (Fla. 1987); Card v. State, 512 So. 2d 829, 831 (Fla.), cert. denied, 107 S. Ct. 2203 (1987). If Florida had retroactively applied the revised part of its abuse-of-procedure rule, that would not be an independent and adequate state ground. See NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 457-58 (1958); Spencer v. Kemp, 781 F.2d 1458, 1470-71 (11th Cir. 1986) (en banc).

standard set forth in Reed v. Ross, 468 U.S. 1 (1984). This Court recently reiterated that under that standard, cause is shown where at the time of the asserted procedural default "'the factual or legal basis for a claim was not reasonably available to counsel * * *.'" Amadeo v. Zant, 56 U.S.L.W. 4460, 4463 (U.S., May 31, 1988) (quoting Murray v. Carrier, 477 U.S. 478, 488 (1986)). As Reed made clear, "the failure of counsel to raise a constitutional issue reasonably unknown to him is one situation in which the ["cause"] requirement is met." 468 U.S. at 14 (footnote omitted).

(a) There Were No Cases Prior To Caldwell Recognizing The Eighth Amendment Principle It Established

The Eleventh Circuit correctly held that this Court's decision in Caldwell was so novel that the basis for

"cause" enunciated in Reed is satisfied here. See Adams, 816 F.2d at 1498-1500. There were no rulings in 1979 or, indeed, before Caldwell, in this Court or any other court, that to undermine a jury's sense of responsibility for capital sentencing implicates the Eighth Amendment. The Eighth Amendment cases prior to Caldwell contain no hint that a capital sentencer's sense of its own role is a matter of constitutional dimension.[17] To the contrary, a footnote in Dobbert v. Florida, 432 U.S. 282 (1977), suggested that it was appropriate for jurors to take a diminished view of their role as a result of an awareness that the trial judge could over-

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[17] Gardner v. Florida, 430 U.S. 349 (1977), was based on the procedural unreliability of allowing a sentencer to consider information which the defendant had no opportunity to explain or deny, not on any particular conception of the gravity of the sentencer's role.

ride their sentencing recommendation. See 432 U.S. at 294 n.7.

Prior to Caldwell, the standard which applied to assertedly improper or misleading jury arguments by prosecutors or instructions by trial judges was not an Eighth Amendment standard at all, but rather the general due process standard of Donnelly v. DeChristoforo, 416 U.S. 637 (1974). As is apparent from this Court's subsequent decision in Darden, 106 S. Ct. at 2472-73 & n.15, the Eighth Amendment standard which Caldwell established is different from Donnelly's due process standard, in that Caldwell holds unconstitutional comments "that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision." Id. at 2473 n.15. Caldwell's creation of an Eighth Amendment

requirement that the jury's sense of responsibility not be diminished in a capital sentencing proceeding caused this Court to utilize a fundamentally different constitutional analysis than in Donnelly, where due process analysis was used because no specific bill of rights provision was thought to be infringed by the prosecutor's misconduct. See 416 U.S. at 463.[18]

Hence, the constitutional landscape here was far different than in Engle v. Isaac, 456 U.S. 107 (1982), Smith v. Murray, 477 U.S. 527 (1986), or even Reed. A major due process precedent of this

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[18] This Court has also recognized in other contexts that due process is a much weaker reed upon which to base a constitutional argument than specific constitutional guarantees, such as the Eighth Amendment. E.g., Spencer v. Texas, 385 U.S. 554, 565 (1967). Compare McGautha v. California, 402 U.S. 183 (1971), with Furman v. Georgia, 408 U.S. 238 (1972).

Court created the basis for the due process claim asserted in Engle, and numerous courts had, in reliance on that precedent, ruled in favor of such claims. Moreover, "dozens" of defendants had raised such due process claims. See 456 U.S. at 131-33. In Smith, this Court said, on the basis of the petitioners' briefs, that similar claims "had been percolating in the lower courts for years at the time of [Smith's] original appeal," and an amicus had attempted to assert that claim in Smith's own direct appeal. See 477 U.S. at 537. The petitioners' reply brief in Smith does, indeed, reveal substantial "percolating": eight federal circuits and two federal district courts had ruled in favor of claims that the Fifth Amendment was violated by the prosecution's use of defendants' disclosures; the Virginia Supreme Court case which rejected such a

claim itself acknowledged that the authorities were split; and the Fourth Circuit decision which Smith asserted as the basis for belatedly raising the claim said that that circuit had substantially answered the question in 1968 -- before Smith's default on direct appeal. See Reply Brief for Petitioner, at 3, Smith v. Murray, No. 85-5487. In Reed, the claim was held to be novel even though at the time of Ross' default, a federal circuit court and the Superior Court of Connecticut had upheld somewhat similar arguments based on the same constitutional provision. Here, in contrast, there was no holding similar to Caldwell under the Eighth Amendment prior to Caldwell.[19]

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[19] Hence, one concern of the dissent in Reed, see 468 U.S. at 25 (Rehnquist, J., dissenting), is not implicated here. Moreover, the Caldwell claim here, unlike Ross' claim as perceived by the dissent therein, see id. at 22, does go to the heart of fundamental fairness.

(b) Both The Eleventh And Tenth Circuits Have Recognized That Caldwell Was Sufficiently Novel Under Reed v. Ross

It is not surprising, therefore, that both the Eleventh Circuit, in this and other cases, and the Tenth Circuit en banc have recognized that Caldwell was sufficiently novel to satisfy the Reed test. The Eleventh Circuit concluded that the "lack of any decisional history indicating that the issues raised by Adams' Caldwell claim were even addressed by the Eighth Amendment * * * gives rise to 'cause' in this case." 816 F.2d at 1500-01 n.8.[20]

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[20] The State has not cited any Eighth Amendment decisions concerning such a claim prior to Mr. Adams' direct appeal in 1979. Indeed, as discussed at pages 67, 88-89, infra, even the cases it cites from later years (which are irrelevant to the procedural default issue, see pages 55-58, supra) do not involve the Eighth Amendment issue involved in Caldwell.

In McCorquodale v. Kemp, 829 F.2d 1035, 1036-37 (11th Cir. 1987), the petitioner (long after Mr. Adams' direct appeal) had unsuccessfully made a due process challenge to a prosecutor's argument. Then, after Caldwell, McCorquodale filed a successor petition challenging the same argument under the Eighth Amendment. The Eleventh Circuit held that the claim was not procedurally barred, because the "case law prior to Caldwell, gave no indication that such statements might violate the eighth amendment." See 829 F.2d at 1036 (which also notes that in Donnelly, this Court had criticized such statements but had held that due process was not violated and that "Caldwell was the first Supreme Court case to hold that prosecutorial statements about appellate review might violate the Eighth Amendment").

Similarly, the Tenth Circuit held that a Caldwell claim was not procedurally barred because at a trial in 1979:

> "counsel could not have known that the prosecutor's remarks might have raised constitutional questions. The law petitioner relies on did not become established until the Caldwell decision in 1985. We cannot expect trial counsel to 'exercise extraordinary vision or to object to every aspect of the proceeding in the hope that some aspect might mask a latent constitutional claim.'"

Dutton v. Brown, 812 F.2d 593, 596 (10th Cir. 1987) (en banc) (quoting Engle, 456 U.S. at 113).[21]

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[21] The holding in Caldwell that there were no adequate and independent state grounds for a procedural bar does not, as the State asserts (Pet. Br. 31-32), show that Caldwell was not novel. Just as, on this appeal, the Court can obviate any consideration of the cause and prejudice test by recognizing that there were no adequate and independent state grounds, see pages 50-55, supra, this Court obviated such consideration in Caldwell.

(c) State Law Decisions Not Involving The Eighth Amendment Did Not Make Mr. Adams' Eighth Amendment Claim Available Prior To Caldwell

Petitioners cite (Pet. Br. 19) state-law decisions, none of which concerned the Eighth Amendment, in an effort to show that the tools were available to assert Mr. Adams' Eighth Amendment claim prior to Caldwell. However, as this Court stated in Engle, what is pertinent is whether the basis of the "constitutional claim" now being asserted was available and whether other "counsel have perceived and litigated that claim * * *." 456 U.S. at 134 (emphasis supplied); accord Reed, 468 U.S. at 14-16.

The state-law condemnation of a practice does not support or suggest its federal unconstitutionality. For example, Donnelly itself quoted Cupp v. Naughten,

414 U.S. 141, 146 (1973), in emphasizing that the fact that an instruction "is undesirable, erroneous, or even 'universally condemned'" is not a constitutional basis for relief, unless "it violated some right which was guaranteed to the defendant by the Fourteenth Amendment." 416 U.S. at 643 (footnote omitted). Similarly, in Barclay v. Florida, 463 U.S. 939 (1983), the plurality opinion stated that "mere errors of state law are not the concern of this Court, Gryger v. Burke, 334 U.S. 728, 731 (1948), unless they rise for some other reason to the level of a denial of rights protected by the United States Constitution," Id. at 957-58.[22] The Court has also recognized the difference for exhaustion purposes, holding that "It is not enough * * * that a somewhat similar

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[22] Accord Engle, 456 U.S. at 121 n.21.

state-law claim was made." Anderson v. Harless, 459 U.S. 4, 6 (1982) (per curiam).

When this Court decided Caldwell, that was the first time that any court had recognized the constitutional right upon which Mr. Adams' current claim is based: an Eighth Amendment right against the undermining of a capital sentencer's decisionmaking responsibility. Prior to Caldwell, the only basis for a cognate claim would have been some state-law conception of the jury's role in that State's particular sentencing scheme -- hardly a sufficient foundation for a federal constitutional argument.[23] Since no constitutional basis for Mr. Adams' Eighth Amendment contention existed before Cald-

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[23] Indeed, the dissent in Caldwell attacked the majority for creating "an independent Eighth Amendment norm." See 472 U.S. at 350 (Rehnquist, J., dissenting).

well, he has demonstrated ample "cause" within Reed v. Ross for his failure to raise that contention on direct appeal.[24]

3. The Eleventh Circuit Correctly Determined That Mr. Adams Has Shown "Prejudice"

The Eleventh Circuit rightly held that Mr. Adams has shown "prejudice" here, since there was "an impermissible

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[24] We will not address the issue of the retroactivity of Caldwell, which the Criminal Justice Legal Foundation seeks to raise as amicus curiae. That issue was nowhere raised or considered below; it is not presented in the certiorari petition; and petitioners continue to say that it need not be considered (Pet. Br. 36 n.9). Nor should it be. See United States v. Taylor, 56 U.S.L.W. 4744, 4745 n.6 (U.S., June 24, 1988) ("Inasmuch as [an] argument was neither raised below nor pressed here, we do not consider it."); Illinois v. Gates, 462 U.S. 213, 217-24 (1983) (Court should not consider issue not raised or decided in the court below); Amadeo v. Zant, 56 U.S.L.W. 4460, 4464 n.6 (U.S., May 31, 1988) (party which failed to contest point below cannot argue it here); Arizona v. Hicks, 107 S. Ct. 1149, 1155 (1987) (Court would not consider a basis for reversal which "was not the question on which certiorari was granted").

danger that the jury's recommended sentence was unreliable and, consequently, that Adams' death sentence was unreliable." 816 F.2d at 1501 (footnote omitted). As discussed at pages 10-11, supra, the trial judge never withdrew or corrected his repeated statements about the jury's complete lack of responsibility for capital sentencing or his assurances that the death sentence would not in any way rest on the jurors' consciences or shoulders -- which he repeatedly emphasized were the "most important" things for the jurors to understand.[25]

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[25] The State's assertion that Mr. Adams was somehow benefitted by these egregiously misleading instructions (see Pet. Br. 39-42) is plainly incorrect. Telling jurors that the decision to impose the death penalty is not on their consciences can only serve to relieve them of whatever inhibitions or hesitations they may have to vote for a sentence of death -- a sentence that would normally weigh far more on a juror's conscience than life imprisonment. The State's attempt to rely (Pet. Br. 40-41) on Justice Stevens' dissent-

(Footnote continued)

Mr. Adams was further prejudiced on his appeal to the Florida Supreme Court. Even if the trial judge had opted to override a jury recommendation of life -- a recommendation which a jury unaffected by Caldwell error could readily have made in view of the three mitigating circumstances present (see pages 11-12, supra) -- the Florida Supreme Court would then have applied the Tedder standard on appeal.

(Footnote 25 continued from previous page) in Rose v. Lundy, 455 U.S. 509 (1982), is also meritless. Justice Stevens specifically said that he would grant relief, even absent an objection at trial, when "the validity of the underlying judgment" is infected. Id. at 544 (Stevens, J., dissenting). Indeed, Justice Stevens has voted to grant habeas corpus relief in such cases as Francis v. Franklin, 471 U.S. 307 (1985), in which no objection was made at trial to a harmful, burden-shifting instruction. Similarly, the State's citation (Pet. Br. 41) of Henderson v. Kibbe, 431 U.S. 145 (1977), is inapposite because Mr. Adams' case, unlike Kibbe, does involve "a misstatement of the law." See 431 U.S. at 155.

Thus, the jury's recommendation would have had to be reinstated unless "virtually no reasonable person" would have voted for anything but the death sentence. 322 So. 2d 908, 910 (Fla. 1975). Since only one more justice would have had to join Justices Boyd and McDonald (who, even absent a jury recommendation of life, believed the sentence to be disproportionate to sentences in similar cases) in order to reverse an override of the jury's recommendation, see Vasil, 374 So. 2d 465 (Fla. 1979), cert. denied, 446 U.S. 967 (1980), there is a substantial likelihood that any death sentence imposed on Mr. Adams would have been reversed.

C. The Interests Of Justice Require Consideration Of Mr. Adams' Claim, Which Involves The Perversion Of The Jury's Deliberations On The Ultimate Question

Mr. Adams is, in any event, entitled to consideration of his Caldwell claim, under the "fundamental miscarriage of justice" exception to the cause and prejudice test, whose application to a capital sentencing proceeding was enunciated in Smith v. Murray, 477 U.S. at 537-38. Smith makes clear that there is a "fundamental miscarriage of justice" if the alleged constitutional error "serve[d] to pervert the jury's deliberations concerning the ultimate question * * *." Id. at 538.[26] In Smith, that test was not met because there was no

[26] This test plainly does not require, as the State asserts (Pet. Br. 36-38), that a prisoner demonstrate his "entitlement to a sentence less than death" or that he was innocent of any statutory aggravating circumstance.

allegation that the challenged testimony was "false or in any way misleading." Id.

In Mr. Adams' case, the jury was repeatedly and emphatically provided with information about its "deliberations concerning the ultimate question" that was both false and misleading and thus served to pervert the jury's sentencing recommendation. As discussed above, if there had not been such perversion, there was a significant possibility that the jury would have recommended a life sentence.

III.

THIS CASE PRESENTS NO OCCASION TO FIND AN ABUSE OF THE WRIT

A. Abuse Of The Writ Is Not A Question On Which Certiorari Was Granted

Abuse of the writ, although the first issue discussed in petitioners' brief, was not mentioned anywhere in the Questions Presented in the State's petition for certiorari. Those questions con-

cerned the application of Caldwell and of the procedural default principles enunciated in Reed v. Ross.

Rule 23(1)(c) of the Rules of the Supreme Court states that "Only the questions set forth in the petition or fairly comprised therein will be considered by the court." As noted above, this Court recently adhered to the rule in Arizona v. Hicks, 107 S. Ct. 1149, 1155 (1987), declining to consider a question beyond the scope of those on which certiorari had been granted. No reason to ignore the Court's rules appears here.

B. Mr. Adams' Eighth Amendment Claim Was Not Available At The Time Of His First Federal Habeas Petition

Mr. Adams cannot be held to have abused the writ by failing to raise his Eighth Amendment claim in his first federal habeas corpus petition in 1984, because at that time he could not have gotten a

ruling on the merits of that claim. The Florida courts would have applied a procedural bar to the claim, for failure to raise it on appeal, just as they did later, in 1986. But at that point, prior to Caldwell, Mr. Adams would have been unable to overcome the procedural bar.

For even if somehow there had been tools to formulate the Caldwell claim prior to the decision in Caldwell,[27] there would still have been no basis for asserting, under Reed v. Ross, that this claim was based on a constitutional principle newly articulated by this Court which had not previously been recognized. See 468 U.S. at 17. Until Caldwell, this Court

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[27] In reality, as explained at pages 88-93, infra, the developments after Mr. Adams' direct appeal and before his first habeas corpus petition was filed did not make his Eighth Amendment claim any more available in 1984 than it had been in 1979.

had not articulated the constitutional principle that there is an Eighth Amendment right against impairment of a capital sentencer's decisionmaking responsibility. Hence, without the benefit of the Court's Caldwell holding, Mr. Adams could not have shown "cause" for the default. Nor could he have shown that the Eighth Amendment violation was a fundamental miscarriage of justice. Nor, by the same token, could he have shown that this Eighth Amendment claim was so fundamental that the Florida Supreme Court's application of a procedural bar would be inconsistent with its treatment of novel constitutional holdings and other fundamental errors and hence would not constitute an independent and adequate state ground of decision.[28]

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[28] After this Court rendered its ruling in Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), the Florida Supreme Court recognized that
(Footnote continued)

Accordingly, the failure to assert the Eighth Amendment claim in Mr. Adams' first federal habeas corpus petition was not abusive. If anything, the raising of such a claim without any chance of getting a decision on its merits would have disserved the purposes of the writ.[29]

C. If Abuse Of The Writ Principles Were Applicable Here, Mr. Adams Could Not Be Properly Held To Have Violated Them

If this Court nevertheless elects to consider petitioners' abuse-of-

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(Footnote 28 continued from previous page) Hitchcock claims were so fundamental that procedural bars did not apply, see, e.g., Thompson v. Dugger, 515 So. 2d 173, 175 (Fla. 1987), whereas prior to Hitchcock, such relief from procedural bars could not have been obtained, since the Florida Supreme Court believed that the constitutional claims lacked merit, see Sireci v. State, 399 So. 2d 964, 972 (Fla. 1981).

[29] See Ritter v. Thigpen, 828 F.2d 662, 665-66 (11th Cir. 1987) (holding of another circuit and even a grant of certiorari do not constitute new law making a claim newly available, for purposes of abuse of the writ).

the-writ argument, the applicable test must be that set forth in Smith v. Yeager, 393 U.S. 122, 126 (1968), which held that the failure to assert a constitutional right or privilege at a time "when the right or privilege was of doubtful existence," followed by the assertion of the right or privilege after a holding of this Court establishes its existence "constitutes no abuse of the writ of habeas corpus." Id. Smith was this Court's articulation of the principles enunciated in Sanders v. United States, 373 U.S. 1, 17-19 (1963), at the time that Congress, in 1976, decided to freeze the Sanders principles into Rule 9(b) of the Federal Habeas Corpus Rules. At that time, Congress rejected this Court's draft of the rule, which would have replaced Sanders' principles with a rule providing that newly raised issues would be forfeited if the

failure to present them in a prior petition was "not excusable." See H. Rep. No. 94-1471, 94th Cong., 2d Sess. 8, reprinted in 1976 U.S. Code Cong. & Admin. News 2478, 2485.[30]

Congress rejected the "not excusable language,"[31] and amended the proposed rule by substituting for it the phrase "constituted an abuse of the writ." The Senate Report which accompanied the change stated that its purpose was to

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[30] The advisory committee's comments suggested that the proposed rule was intended to give the courts greater discretion than had existed to dismiss newly raised claims. See Clinton, Rule 9 of the Federal Habeas Corpus Rules: A Case Study on the Need for Reform of the Rules Enabling Acts, 63 Iowa L. Rev. 15, 38-39 (1977).

[31] See H. Rep. No. 94-1471, 94th Cong., 2d Sess. 5, reprinted in 1976 U.S. Code Cong. & Admin. News 2478, 2482 (suggesting that the "not excusable" language "created a new and undefined standard that gave a judge too broad a discretion to dismiss a second or successive petition").

bring "Rule 9(b) into conformity with existing law," id., i.e., Sanders and Smith v. Yeager.

Hence, even were this Court to disagree with the wisdom of Rule 9(b), such a disagreement would not allow the Court to ignore the judgment of Congress and to fashion a new standard. "To allow otherwise 'would confer on the judiciary discretionary power to disregard the considered limitations of the law it is charged with enforcing.'" Bank of Nova Scotia v. United States, 56 U.S.L.W. 4714, 4715 (U.S., June 22, 1988). As Justice White stated in Autry v. Estelle, 464 U.S. 1301 (1983):

> "In my view, it would be desirable to require by statute that all federal grounds for challenging a conviction or a sentence be presented in the first petition for habeas corpus. Except in unusual circumstances, successive writs would be summarily denied. But historically, res judicata has been inap-

> plicable to habeas corpus proceedings * * * and 28 U.S.C. § 2244 (a) and 28 U.S.C. § 2254 Rule 9 implicitly recognize the legitimacy of successive petitions raising grounds that have not previously been presented and adjudicated."

Id. at 1303.[32]

D. The Legal Developments Cited By The State Did Not Provide A Reasonable Basis For Asserting Mr. Adams' Eighth Amendment Claim In 1984

The State makes some irrelevant arguments and cites various legal developments after 1979, as well as the old

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[32] Even if this Court were free to adopt a new standard, it should not be as harsh on prisoners as the cause and prejudice test, which was adopted to meet a different problem and will apply to any violation of a state procedural bar anyway. The procedural default doctrine was adopted out of concerns for both finality and federalism. See Engle v. Isaac, 456 U.S. 107, 130 (1982). Only the former concern is involved when a prisoner asserts a new claim in a second federal habeas corpus petition. Since the earlier judgment involved was that of the federal court itself, the chief tension to be resolved is simply that between finality, on the one hand, and the interest in effectuating prisoners' federal constitutional rights, on the other hand.

state-law cases discussed at pages 69-71, supra, in asserting (see Pet. Br. 18) that a competent attorney would have raised Mr. Adams' Eighth Amendment claim in 1984. One point that should be set aside at the outset is the insinuation that Mr. Adams' counsel may have engaged in "a mere delaying tactic" (see Pet. Br. 17). As described at pages 13-14, supra, far from engaging in delay, Mr. Adams' volunteer counsel, without any experience in capital litigation and lacking anyone with experience in collateral litigation to provide guidance, was forced to put together a Rule 3.850 motion and then a habeas corpus petition within a small number of days. Counsel's predicament was so outrageous that it has been described in a law review article, to "illustrate the accelerating counsel problem in Florida." See Mello, supra, at 569, 571-74.

Clearly, this was not a situation in which a known claim was deliberately withheld. Unlike Woodard v. Hutchins, 464 U.S. 377 (1984), there is an explanation for Mr. Adams' raising the Caldwell claim only in the second petition: the claim is premised upon a major intervening development, this Court's holding in Caldwell. As the Eleventh Circuit has recognized, such an Eighth Amendment claim had not "been raised and considered in a number of other cases at the time" of Mr. Adams' first habeas corpus petition, nor had this Court's precedents indicated that the Eighth Amendment was implicated by statements which undermined the jury's sense of responsibility for capital sen-

tencing. See Adams, 816 F.2d at 1495-1496 & nn. 1 & 2.[33]

The State asserts incorrectly that such precedents did exist. The two Eleventh Circuit cases it cites (Pet. Br. 19-20) raised due process claims, not Eighth Amendment claims. Hence, for the reasons set forth at pages 62-63, supra,[34]

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[33] The State is simply incorrect in contending (Pet. Br. 23) that the Eleventh Circuit ignored the question of abuse of the writ and did not consider the state of the law at the time of Mr. Adams' first habeas corpus petition. The State seems to have overlooked the section of the Eleventh Circuit's opinion entitled "Abuse of the Writ." See 816 F.2d at 1495-96.

[34] This Court has recognized in the context of exhaustion that claims raised under different constitutional provisions or different constitutional analyses are not the same. See Picard v. Connor, 404 U.S. 270, 276-78 (1971) (Fifth and Fourteenth Amendment claim of denial of right to indictment by grand jury, as applied to states by due process, is not substantially the same as an equal protection claim); Anderson v. Harless, 459 U.S. 4, 7 & n.3 (1982) (claim of broad federal due process right to jury instructions which properly explain state law is not the same consti-

(Footnote continued)

they provided no basis for the Eighth Amendment claim Mr. Adams is now asserting. Indeed, in one of those cases, McCorquodale, the petitioner was permitted following Caldwell to assert an Eighth Amendment claim based on the same facts as his earlier due process claim. See page 67, supra.

Another instance relied upon by the State (see Pet. Br. 33-34) is the litigation involved in Moore v. Maggio, 740 F.2d 308, 319-21 (5th Cir. 1984). But the Eighth Amendment claim raised -- and rejected -- in that case was not the claim being raised here. Instead, it was a claim that the Louisiana Supreme Court had failed to engage in "meaningful appellate

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(Footnote 34 continued from previous page)
tutional claim as one based on the more particular analysis developed in such cases as Sandstrom v. Montana, 442 U.S. 510 (1979)).

review." Indeed, if the harried, inexperienced counsel representing Mr. Adams at the time of his first habeas petition had somehow gotten a copy of this month-old Fifth Circuit decision, they would probably have skipped right over the section of the opinion entitled "Meaningful Appellate Review," which discussed and rejected that different Eighth Amendment claim.[35]

The only other authorities cited by the State, aside from the state court decision in Caldwell v. State, 443 So. 2d 806 (Miss. 1983), in which every justice believed the issue involved to be one of state law, are Justice Stevens' concurrence in Maggio v. Williams, 464 U.S. 46

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[35] As part of that discussion of the state supreme court's failure to reverse, the Fifth Circuit cited the Eleventh Circuit's rejection of due process claims in the two cases discussed at pages 88-89, supra. See Moore, 740 F.2d at 320.

(1983), and this Court's decision in California v. Ramos, 463 U.S. 992 (1983). In Williams, the Court held that the argument presented was either insubstantial or unpersuasive, and Justice Stevens, who never even referred to the Eighth Amendment, was doubtful that the prosecutor's argument made the trial fundamentally unfair. See 464 U.S. at 52-56.

Ramos also clearly did not provide the tools to make the claim which Mr. Adams is now presenting. It certainly did not clearly foreshadow Caldwell, at least in the eyes of the 7 out of 8 justices who voted in the majority in one case but in the dissent in the other. The dissenters in Caldwell believed that Ramos was not distinguishable and that the asserted Eighth Amendment claim should therefore not be granted, see 472 U.S. at 351 (Rehnquist, J., dissenting), while the Caldwell

majority found it necessary to distinguish Ramos, see id., at 335-36.

In Ramos, the closest this Court came to discussing the diminution of a jury's sense of responsibility was in saying that telling the jury that a death sentence could be commuted "may incline them to approach their sentencing decision with less appreciation for the gravity of their choice and for the moral responsibility reposed in them as sentencers" and thus "may operate to the defendant's distinct disadvantage." 463 U.S. at 1011. This was followed on the next page with the statement that in view of the Court's holding that what occurred in Ramos was constitutional, "we do not suggest, of course, that the Federal Constitution prohibits an instruction regarding the Governor's power to commute a death sentence." Id. at 1012 n.27. So, if anything, this

discussion was the opposite of a tool to use to make an Eighth Amendment challenge. This Court seemed to be saying that even if the jury had its sense of responsibility undermined, that "of course" would not be unconstitutional.[36]

E. The Ends Of Justice Require Consideration Of Mr. Adams' Claim

Mr. Adams' claim should be considered in any event, because the core Eighth Amendment "standard of reliabil-

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[36] As the Eleventh Circuit has pointed out, Ramos rejected an Eighth Amendment argument that there was "an unacceptable level of unreliability in the capital sentencing determination," that the jury was "deflected * * * from its task" and that "the instruction was misleading * * *." Adams, 816 F.2d at 1495 (quoting Ramos, 463 U.S. at 998). The Eleventh Circuit also noted that Ramos indicated (a) that the principal concern of Eighth Amendment jurisprudence was procedure, not substantive factors, and (b) that except for the substantive limits which this Court had previously imposed, the State was free to choose the substantive factors which capital sentencing juries would consider. Adams, 816 F.2d at 1495 (citing Ramos, 463 U.S. at 999, 1001).

ity," Caldwell, 472 U.S. at 341, has not been met here, in view of the "inaccurate and misleading" statements by the trial judge which denigrated the jury's role in capital sentencing. See id. at 342 (O'Connor, J., concurring).[37] Elemental justice requires that Mr. Adams not die without a constitutionally reliable sentencing proceeding wherein the consciences of the community have an undiminished sense of their responsibility and an accurate understanding of the consequences of their decision, and do consider the sentence imposed to be on their consciences.

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[37] The State cites (Pet. Br. 17-18) the plurality opinion in Kuhlmann v. Wilson, 477 U.S. 436 (1986) and the Court's statement in Smith v. Murray that the concept of colorable innocence "does not translate easily" to capital sentencing proceedings, 477 U.S. at 537. But it does not seem to argue for the use of that concept, nor does it explain how the concept would be translated. In any event, Kuhlmann involved the repeated raising of the same claim, not the raising for the first time of a new claim. And as discussed at pages 76-77, supra, Mr. Adams does come under the exception enunciated in Smith v. Murray.

CONCLUSION

For all the reasons set forth above, Respondent respectfully requests that this Court affirm the judgment of the Eleventh Circuit.

Dated: July 2, 1988

Respectfully submitted,

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